SETTING UP THEMES FOR STORYTELLING FROM VOIR DIRE THROUGH CLOSING ARGUEMENT
BY

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VOIR DIRE

Jury selection comprises the most crucial art of the trial lawyer in civil and criminal cases. You can possess the most compelling fact scenario imaginable but without receptive jurors, you will lose before you begin - in essence, you will be running on empty. Jurors who are significantly predisposed against your client or defense, for any reason, will neither listen to nor consider the evidence in any way consistent with your position - not because they don't want to but they can't. Their mindset has already blocked any information inconsistent with their strongly held beliefs. Therefore, our task as trial lawyers is to identify then strike, either for cause or peremptorily, those prospective jurors that lack the ability to be receptive to our theory of defense.

In criminal cases it is important to know that only the rarest of jurors truly presume your client innocent, although almost every prospective juror will proclaim he or she does, and actually believe it in their heads. Our job in jury voir dire is to begin the daunting task of putting them in a neutral place, and to find out which ones cannot or do not presume your client entirely innocent.

At some point through the questioning process, I ask questions to clarify the grand jury process - why an indictment is not evidence of a crime and why jurors must always presume

someone innocent. First, a grand jury decides a case usually entirely upon *hearsay*. Once prospective jurors discover that a grand jury meets in secret, never decides the question of guilt or innocence, only takes a majority vote, and the accused is neither invited nor told the GJ is meeting, they begin to perk up. And of course no one calls witnesses for the defense.

When they further learn that the average case before a state grand jury takes about five minutes to consider, and that the only person they usually hear from is a police officer and not a victim, they really start to see a light. When they learn that no defense lawyer is there to cross-examine the officer and test the information or present another side, they are primed to consider your client innocent until and unless the prosecutor proves the hearsay allegations beyond a reasonable doubt. In most states, the DA has absolutely ***no obligation*** to present exculpatory evidence to the Grand Jury. This fact is impactful, to say the least. When they learn that the indictments are pre-printed by the DA's office, many are surprised. Finally, we remind them that the oath they take requires them to presume your client innocent.

If I can find a former grand juror in the venire, I will ask that person these questions in a somewhat leading way. Otherwise I will just ask the questions in a way that elicits this information. The following is one way if a prospective juror has served on a Grand Jury:

"Mr. Jaffe: Has anyone here ever served on a Grand Jury?

The prospective juror raises his hand.

Mr. Jaffe: Were you the foreperson?

Ms. Jones: No.

Mr. Jaffe: Ms. Jones, approximately when was it that you served as a member of the Grand Jury?

Ms. Jones: About two or three years ago.

Mr. Jaffe: Do you recall serving with approximately seventeen other individuals?

Ms. Jones: Yes that is about right.

Mr. Jaffe: You served for a week. Is that right?

Ms. Jones: Yes.

Mr. Jaffe: And if I told you that the Jefferson County Grand Jury considers approximately 450 cases per week, would that be consistent with your experience?

Ms. Jones: Yes, I think that's about the amount. It certainly was a lot.

Mr. Jaffe: Now that's a lot of cases to consider, as you suggest. Would it be fair to say that in most cases, you only heard from one witness, normally a detective or police officer?

Ms. Jones: Yes, in most cases.

Mr. Jaffe: And normally that police officer or detective would offer a brief summary of the case from his or her perspective?

Ms. Jones: Yes, sir.

Mr. Jaffe: And often the police officer or detective would simply read from a report in giving that testimony?

Ms. Jones: Yes.

Mr. Jaffe: And often that would take usually no more than about five or ten minutes?

Ms. Jones: That's true.

Mr. Jaffe: And in many, if not most cases, the victim of the crime would not even testify or even be present - only mentioned in the report?

Ms. Jones: Yes.

Mr. Jaffe: Now you never saw the person accused of the crime in the Grand Jury?

Ms. Jones: That's true.

Mr. Jaffe: And there was no defense lawyer to test the reliability of the report or offer another side to the story?

Ms. Jones: That's also true.

Mr. Jaffe: So no one was there on behalf of the accused to cross-examine witnesses or offer any explanation that might exist?

Ms. Jones: No.

Mr. Jaffe: So, in most cases all you heard was someone who wasn't even present when the crime was committed, who the prosecutor called to read a report?

Ms. Jones: Yes.

Mr. Jaffe: So basically all you heard was one side consisting of hearsay or in other words information not directly experienced or observed by the person reading the report?

Ms. Jones: That's true.

Mr. Jaffe: And, of course, you met in secret - no one was there in the room but the prosecutor, the Grand Jurors, and the police officer?

Mr. Jaffe: While you served as a grand juror, did anyone in the grand jury room prepare any indictments?

Ms. Jones: No

Mr. Jaffe: So after votes were taken someone from the District Attorney's office delivered the indictments and the Grand Jury Foreperson signed them?"

The above represents one way of demystifying the presumption of guilt. When jurors hear that an indictment is nothing more than a piece of paper upon which a charge is written, it has an impact. We can begin this educational process during voir dire by a colloquy as demonstrated above or by simply asking the prospective jurors if they knew or understood the process as outlined. The point is that the jurors begin to see why the indictment is not evidence and why the presumption of innocence is so important and tangible, since no one has heard but one side or version of a disputed story.

Once I feel the prospective jurors are primed to presume my client innocent and not require him or her to testify or prove anything, I shift to open ended questions. Open ended questions serve as the best way to obtain information, which is our main goal. While often counter-intuitive for us,

we must focus on obtaining information, not demanding it. Accordingly we must be willing to live with the answers; otherwise we are simply looking in the mirror and conversing with ourselves.

Every trial is of course case specific. Thus, we have to see if this is a case that is appropriate for a prospective juror to serve on. For example, you would tend to not put a person who has recently lost a family member on your jury, if it is a murder case. You would not leave a nun on in a case involving abortion. You would not leave a person on the jury in a robbery case if that person works or has worked at a bank. You would not leave a person on if they were close friends with the victim or district attorney or perhaps the judge. If a rape or sexual assault case, you would strike a person that has been raped, or a child care worker, absent extraordinary circumstances. While these people might want to be fair, in certain cases, it is simply asking too much of them.

We ask questions that are case specific, not to attempt to win our case during voir dire, but to make sure we identify jurors with open minds. In an ID case, we would want to know, for example, if the prospective jurors believe that identification testimony is really reliable. We might ask if they have ever been misidentified or if they have mistakenly walked up to someone they thought they knew but it was the wrong person. We might want to raise the fact that almost all of us have many doubles in the world.

In certain cases, we may need to ask what they think about paid "experts?" What do they think of informers? What are the factors that make a witness credible or not? What are their views about police officers? In most cases it is important to know about the relationships prospective jurors have with police officers, and their views on whether police officers make more credible witnesses than lay witnesses. If the police officers credibility determines the case, we need to know if the jurors would tend to believe the testimony of a police officer in any instance, especially if it conflicts with that of a lay witness. If so, it could set up a challenge for cause.

Questions involving race may well be necessary to ask in case where it is the pivotal pink elephant in the room. These questions are not easy to ask and add to the inherent discomfort of the proceedings, but we must, at times, ask them.

The jury selection process is a way not only to identify those jurors to strike, but to also begin to earn credibility. The prosecutor walks in with it; we need to earn it, and that begins when we initially address them. We know from many studies that jurors will tend to believe the lawyer that seems the most candid, prepared, and sincere. Warmness goes a long way as does speaking in a conversational style without the use of legalese.

Most importantly, like in any important relationship or conversation, listening is the key component that lawyers rarely develop. Conveying a genuine interest in their answers, and when appropriate, asking follow up questions communicates sincerity, and forms a connection that we hope to build on throughout the trial. Voir dire should ideally become a series of conversations as one would have with strangers one truly wants to get to know. This is not a one way street insofar as we too need to sometimes make disclosures about ourselves, our case, or our clients, if we expect the same kind of candor from them.

Regarding the oath the jurors take, emphasize it from the beginning - its importance and significance; it is an affirmed promise upon which our justice system rests, and we will remind them of this during closing arguments. The juror's responsibility is to test the prosecution's proof. In essence they are investigators of the facts and detectives of the truth. But just as significantly, they need to know that - just like the judge and prosecutor- ***we too are officers of the court.*** We too take an oath. And as part of that oath we often must object when we believe the prosecutor is not following the rules of evidence or if we think that something is inadmissible. We would be

violating our oaths if we did not. It is at this point that I let them know that I object often - not to hide anything - but because I am duty bound to follow my oath.

It is also crucial to be organized. Thumbing through notes and plodding along aimlessly destroys the image we want to obtain and maintain. It communicates incompetence and a lack of respect for the seriousness of the case, and their precious time.

Public speaking is truly frightening for most people in any context and court procedures make it more so. The more we can relax the jurors and make it interesting and safe for them, the more we will find out about them, their views and sometimes biases that are hidden even to them. Most importantly, we must be ourselves and that will serve to give permission to jurors to be who they are as well. The most important thing we can do is create a safe atmosphere so that we encourage the prospective jurors to talk to us openly and honestly in public - no easy task but necessary if we are to select jurors that have the capacity and desire to be fair.

OPENING STATEMENTS

By the time we get to opening statements the selected jurors are naturally curious about the other side because now they realize that there is another side. They want to test the quality of the proof. I often tell jurors in my opening statement that they are powerful people performing a vital function in the truth seeking process. They are not simply rubberstamps. They do not sit passively in a secret Grand Jury to hear a selected chapter of a complex story.

I emphasize to the jurors in the opening statement that in accordance to their oaths, they have become (as the Judge will tell them) the "exclusive judges of the facts." Not even the Judge is that powerful. The Judge rules on evidentiary issues or points of law, but it is the jurors who

determine the facts and the credibility of the witnesses as well as decide whether the Government can overcome the presumption that our client is innocent. That is their oath. The Judge referees legal disputes. The jurors individually decide if the Government has met its burden of proof beyond a reasonable doubt. Jurors care about doing the right thing and take their oaths seriously but we must be vigilant in constantly reminding them of what their oaths require.

Since all jury trials come down to competing stories, it is crucial that:

1. The jurors know that there the prosecution story is just that- an unproven story or version
2. There is more to the prosecution's story than they have yet heard, and
3. Once they the rest of the story, they will see that ours is is the more compelling one.

Accordingly, you must communicate the power of your theme and theory of defense clearly in your opening. If your theme is persuasive and supported by the law, the jurors will be less apt to view the evidence only through the prism of the prosecutor's lens. Your opening is successful only if, at the end of it, before any evidence is presented, were the jury then asked to vote, they would vote either not guilty or at least vote "I don't know". "I don't know" represents a reasonable doubt and that is a not guilty. And, of course, that is the law that the jurors swore to uphold. In other words, if it appears that a person is more than likely guilty (preponderance) or probably (clear and convincing), the prosecutions' burden of proof has not been met. Each of the above standards is less than a reasonable doubt.

Your voir dire, opening statement, cross-examinations, direct examinations, closing argument, and requested jury charges, should all work and fit together organically. The theme of your case - your theory of defense - runs through each of them, and binds them together.

For example, if in a murder case, your theory of defense is self-defense, your cross-examinations would not focus upon identity questions or even lack of forensic proof. If you attack the quality of the police investigation, it would only be for the purpose of supporting your self-defense claim. Your theory of defense, beginning at voir dire and culminating in the jury instructions you create and request, create the framework for the story. The facts form its fabric.

When you complete your opening, you want the jury to perceive your client and you differently; at worst, they have questions, and at best, you have shifted the burden of proof back to the prosecution where it belongs in the first place. Your opening becomes the window through which jurors view and process your questions on cross and direct. It gives your questions context to allow the jury to process the facts into a story that is just as compelling, hopefully more so, than the shallow, untested presumption of guilt they started with when they received their juror summons.

Yet a believable story and theory of defense is not enough. Even the most interesting story, if not told compellingly with power and passion, and logical flow, can be boring and confusing, and thus worthless and wasteful. In other words, it is not enough to possess the most compelling story. We must be the most compelling storytellers, and adopt the skills and tools to capture and hold the jurors' interest.

Some of the jurors learn best visually, some orally, and some intuitively. We must speak to each of them in their own language, using props, visuals, and any other appropriate demonstrative aids to keep them engaged and interested. To the extent that you can use your voice by modulating its speed, pitch, tone and volume, do so. If you are able to, do not stand in one place. Move around, use the courtroom as a prop and control it. And above all, be credible,

confident, passionate, and convey the necessary humility. Jurors will only believe you if they believe you believe you.

Most importantly, never over-promise. Always keep your promises. In this way, you earn trust and that builds to the extent your opening is reflective of the evidence. Moreover, do not shy away from "bad" facts. Lawyers have a tendency to run away from those harmful aspects of the case already built into it. In your opening statement, show jurors that you do not fear such evidence. Instead find a way to minimize it, neutralize it, or even embrace it by fitting it into your theory of defense, when possible.

The opening statement provides an opportunity to clear the landscape and, thus, allow jurors an opportunity to create an ending consistent with the presumption of innocence. It provides an opportunity we cannot afford to squander. It represents a path upon which they must follow the evidence as outlined in your opening statement. You are the juror's guide and in some cases, teacher. You are the one person you want them to look to for the best interpretation of the facts. Your goal is that the jurors will be open to rendering a verdict of not guilty, and questioning the prosecution's proof along the way.

CLOSING ARGUMENTS

The closing argument can be critical if the stage has been set by developing the most powerful pivotal themes from voir dire, opening and cross examinations. To powerfully set the stage, we, at the very least, must raise significant questions as to the prosecutor’s proof. We must paint a picture with our themes and theories that tell the story we want the jury to adopt. And in the end we must empower the jurors to adhere to their oaths and render a just verdict in favor of our clients.

THE INTERPLAY OF THE OPENING AND CLOSING

The closing argument normally mirrors the opening by answering the questions raised early on. Often, it is effective for the opening statement to raise questions and then the closing statement point out the numerous questions that remain unanswered, or perhaps raise other questions as well. The closing argument, in essence, ties up the package presented in the opening statement. In short, the closing argument must motivate the jury to vote in our favor.

Therefore, to be effective in our opening and closing arguments, we must accurately recognize the environment of the battle and the lay of the land. Throughout the trial we must constantly be aware of and sensitive to those realties. We must be prepared to face head-on the **presumption of guilt** that permeates the courtroom in practically every criminal trial.

QUESTIONS JURORS ASK

1. Why would this person be sitting there unless he was guilty? Already they know that the prosecutor and the police believe, and maybe the judge, that the defendant must be guilty or he wouldn't be there in the first place.

2. Who is the most credible lawyer in the courtroom?

3. Is the lawyer simply playing a role or does he really believe and care about his client?

4. Who can we trust? Who can we believe?

5. Whose position is most consistent with rendering the right verdict?

6. How does the lawyer treat us when he addresses us in voir dire, opening statement, and closing argument?

7. How does the lawyer treat the witnesses, the opposing counsel, and the judge? How is he being treated and why?

8. How does the lawyer communicate with his client in the courtroom? Was he paying attention to his client? Is he aware of and sensitive to what is going on with his client as the trial progresses?

9. What impressions do they have of the client before, during and after trial?

PRINCIPLES IN CLOSING PRESENTATIONS

1. THE CLOSING ARGUMENT BEGINS THE MOMENT YOU WALK INTO THE COURTROOM

Jury argument is the combination of both intentional and unintentional communication. Even before the trial begins, jurors bring with them their individual preconceived notions about criminal defendants, the advocates, the accused and trials in general and perhaps yours in particular if it has received pre-trial publicity. Never doubt that you are always on. They begin to watch you, the prosecutor, the judge, court personal and your client the moment they walk in and will continue throughout the trial. Jurors measure every gesture, word and movement you make. During breaks they legally can't talk about the case but be assured lawyer observations are a favorite topic for them to discuss.

In one particular trial I happened to be sick with a sinus infection that wore on me and took its toll after the closings concluded. At one point during the court's rendition of the jury instructions, I lifted my arms, yawned and felt like collapsing in my seat. Later, after an adverse verdict, a juror reported in a post-trial interview, that he felt like I had "given up" and did not really believe in my case. I am not saying I lost because of that but it does highlight the reality that at any given moment, some juror probably is watching you and your client and interpreting facial instructions, movements and actions. For that reason alone, we must realize that our words especially count. We cannot afford to waste them or sloppily and carelessly allow them to flow from our lips.

2. KEEP YOUR CREDIBILITY AND KEEP YOUR PROMISES.

Already, the prosecutor wears the white hat, as far as the jury is concerned. The media has already poisoned the atmosphere with prejudice against our client and has magnified the trauma

experienced in the community. It is thus crucial that during closing argument, wee cdan point out that everything we said in opening turned out to be accurate. And since prosecutors often over promise and under deliver, we can use this as a poignant contrast pointing to us as the most credible.

Above all you must be yourself. A juror can just as easily spot a fake. Some people are born performers or are naturally funny. Some are more reserved, while others more animated. Jurors are testing and judging you for sincerity, integrity and honesty. In the end they must decide who to trust the most and whose story makes the most sense. Those times that lawyers who faked it won did so in spite of that. A trial lawyer should not adopt another lawyer's style especially if it is inconsistent with his individual personality.

Just as significantly though, we must adapt our personality to our particular case and defense. A lawyer defending a white collar case would probably not project the same persona in defending a drug case.

Finally, throughout the trial the jury must know that we believe in our client and her cause. defense. The most successful outcomes for criminal trials occur when the focus of the jury turns to what really counts - questioning the proof and rendering a verdict consistent with the evidence and the juror's oath.

3. ACKNOWLEDGE THE WEAKNESSES IN YOUR CASE

To maintain our credibility, we must acknowledge the weaknesses in our case. We must seize this opportunity to anticipate the worst facts and address them. We cannot afford to pretend they do not exist. We need to help the jurors place these weaknesses in the proper prospective. For

our purposes, they need to be perceived by the jury as minor, more or less on the fringe, in relation to the crux of the entire case.

For example, in one re-trial of a capital case, we learned from post-juror interviews in the original trial, they were extremely upset over the fact that our client had carried on an adulterous affair for over four years. The state had accused our client of killing then raping his wife. From voir dire, opening and continuing into closings, we never ran from the adultery. We wanted to 1) desensitize the jury to it, and 2) we wanted the jury to put it in its proper prospective. In the closing arguments, we successfully argued to the jury that our client "has been punished enough for his adultery but he is not guilty of capital murder".

In another capital case, again, our client had been previously sentenced to death and convicted twice of that capital offense. At this re-trial, we admitted that the client was guilty of robbery but not guilty of killing the store manager. By admitting the robbery, and asking the jury to singularly focus on the question of whether the proof was sufficient to convict him of homicide, we were able to maintain our credibility and avoid fighting issues we could not credibly defend.

The lawyer's credibility is the juror's first and easiest measure of the client. In essence the lawyer is an extension of the client, who often will not testify and even if he does, that testimony takes up only a small, very important, amount of trial time. Our job is to build credibility throughout the trial and transfer it to our client.

It is just as important to be straightforward with them about the hard choices they will be called upon to make. Our story is diametrically different from that of the prosecution. But they have the burden of proof. We must continuously emphasize their oaths to render a verdict of not guilty if the prosecution fails to meet it.

4. ATTACK THE WEAKNESSES OF THE PROSECUTION'S PROOF AND GET THEM ON THE DEFENSIVE

It is almost always a mistake to totally rely on the weaknesses in your opponent's case. Jurors want a context. Why is it that a particular witness cannot be believed? What was the witnesses' real motive to lie? Why is her version not to be believed?

It has certainly been said many times that a good defense is often a good offense. Given the often insurmountable odds facing us, we must seize the opportunity to clearly focus on the weaknesses in the prosecution's proof. For example, if the case is entirely circumstantial, that needs to be hammered over and over again. While circumstantial evidence is as good as direct evidence, nevertheless the judge will charge the jury that unless it excludes every reasonable hypothesis except that of guilt, the verdict must be "not guilty". In other words, if there is any reasonable theory consistent with innocence, then there is a reasonable doubt. These can be powerful themes, and if set up properly, can place the prosecution on the defensive, often causing them to constantly find a way to plug holes, some of which may be significantly deep. However we have to sense which holes are deep enough to create a reasonable doubt and weave those into the story of our case.

Don't be afraid to summarize for the jury the prosecution's case. In this way we show them that we are not afraid of it and it allows us to frame their evidence in our terms. If we are using their evidence to place the case in a different light, we say that even their evidence shows this or that, or even their witnesses confirm some point for us.

However, we must choose our battles. We will not maintain our credibility if we attack every point, especially the minor ones. A very useful tool is for us to discipline ourselves to pare down our theory of defense to ten words, or articulate it to ourselves or someone else in thirty

seconds or less. We can then focus our attacks on the pivotal points that matter, and not become distracted with facts or evidence that do not advance our theory of defense.

5. CHOOSE THE THEMES THAT ARE THE MOST POWERFUL AND PIVOTAL TO THE RESULT YOU INTEND

It is often too general and vague to simply assert a "they didn't prove their case" theory unless you can demonstrate large factual gaps in the prosecution's proof. While walking the fine line of not taking on any burden of proof, it may be best to also offer an alternative explanation that is more powerful than the prosecution's proof. That can also serve as a powerful reasonable doubt.

In developing the closing argument, understand that, in essence, we are salesmen. We are both selling ourselves our client's defense. We also are agents, publicists, psychologists, producers, directors and actors in a real life drama in which the jurors choose the ending. It is our task to motivate our jury to adopt our product rather than that being peddled by the prosecution. To do that, we have to understand the political and social climate prevailing in the courtroom. We have to know what themes will play to this jury and how to promote them.

In every trial, there are certain themes that form the key to a defense verdict. Our task is to choose the most powerful ones that will resonate with the jurors in our case. For example, in a sexual assault case, jurors will want to know what motivated the complainant to press the charges in the first place. If we can offer a motivation to them that supports our defense, we should. Perhaps the complaint arose during a domestic dispute. Perhaps a child wanted to avoid punishment for something and decided to allege a complaint against your client. Perhaps your client was a step parent and the child wanted her parents to get back together. Perhaps it was financial. The point is we must choose carefully our defense strategy that jurors will understand and believe.

For example, in a homicide case, the State relied mostly on the testimony of an eyewitness who claimed he knew our client and saw him fatally shoot the passenger of a car. According to the evidence technician who arrived within minutes of the shooting, he wrote down in a police report every single person on the scene that knew anything or saw anything about the shooting. In fact, the report contained the names of eleven people but the name of the state's best supposed eyewitness was not on the report. The version of the "eyewitness" was inconsistent with the other witness who witnessed the shooting but could not identify the shooter.

We could have defended the case by showing that his version was not only incorrect but from where he placed himself a building would have obstructed his view. Knowing the difficulty with eyewitness testimony from one who claims he knows the person he identifies, we chose instead as our theory of defense that the "eyewitness" was never at the scene that night. Our investigation revealed that he had a history of providing the police information for money that had historically allowed him to avoid being arrested on drug charges. We labeled him a "street peddler of information." The jury had no problem remembering what really counted about him and the quality of his information.

Probably the best theme I know is the one developed by Mike Tigar in the Terry Nichols case: "Terry Nichols was building a life not a bomb." This theme capsulated the entire case and it was the winning theme not only for the innocence/guilt phase but also the penalty one.

In almost every case we can find a universal theme or motif that is larger than the factual scenario of our case. Injustice itself is repellant to almost every juror as is a rush to judgment, sloppy police practices, perjured testimony etc. Wrongful accusations resonate with everyone. The effect or meaning of their verdict then transcends your client and his case.

6. USE THE FACTS AND LAW TO HIGHLIGHT THE STRENGTHS OF YOUR CASE

No matter how lofty and eloquent the argument or how emotional, jurors care about the law and the facts, and most take their oath seriously.. In the end they want to feel like they did the right thing and to feel as good as possible about their verdict. You are their guide. In the opening you create the map and chart the course you want the trial to take in order to lead to the conclusion to be reached. Jurors are well aware of their awesome responsibility and their power. The advocate is attempting to frame the evidence to fit into the winning and into the law as instructed. Your framework must make sense to them. By suggesting ways to view the evidence and highlighting the law as the judge instructs it, and tying it all to their oaths, you let them know that you respect their ability and power to reach the result you want.

If the prosecution's case relies mainly upon snitch testimony, we utilize the court's instructions on accomplice testimony - that it is to be viewed with caution. If the snitch lied under oath, we emphasize that lying under oath is the worst form of deceit, for it is not done in anger but in a cold calculated manner that disgraces the Bible. This argument is even more powerful if the witness sought a deal. There are certain principles that are not for sale such as the truth but for them it was bought and sold.

Summation is all about space and emphasis. There is limited space in which to emphasize the pivotal highlights that suggest the desired result. Whenever possible, utilize visuals and use exhibits and/or demonstrations. Overhead projectors allow us to present photographs, charts, jury instructions and even physical evidence. Jurors like visuals, which command attention. Studies have conclusively shown that we maintain and remember many times more with visual aids.

Whenever possible, utilize photographic enlargements, diagrams, and charts, and handle the physical evidence and exhibits upon which you want them to focus.

7. WE MUST FIND A WAY TO EMPHASIZE THE PIVOTAL FACTS

Don't assume that brilliant cross did the work for you. The most important facts need to be placed in the context of our themes and theory of defense. Jurors may or may not remember what we think is important even if they were paying attention. Memories are fleeting and fragile at best. Demonstrative evidence can help them remember key facts upon which our case rests. Cell phone and tower records, for example, can be powerful support for a timeline and alibi. Photos of shell casings can support where a shooter probably was standing. Blowups of text messages and social media such as Facebook, MySpace, Twitter, etc. can show motivations and be impeaching.

We must understand the pivotal strengths in our case, and focus on how they create reasonable doubt and otherwise support our theory of defense. In delivering our opening statement, we often lose sight of the fact that we know our cases inside out but the jurors do not. During the trial they receive the facts and the law in pieces and often out of order without sufficient context. In our summations we seek to give them an order and a context, first by framing our arguments logically, then supporting them with the facts we want them to remember, in the context of our most powerful themes.

Jurors want our help in how to view the facts in light of the law and jury instructions. Blow ups of key instructions such as the stand your ground law in self defense can be enormously powerful. Facts must come alive, but can only do so, with our help.

Painting word pictures is an effective way of making something we saw or heard memorable, as do relevant metaphors and analogies. And there is no better way to make something

more memorable than to attach it to an emotion. Most of the great works of literature, music and art remain alive because of their emotional content. When Michael Tigar walked behind Terry Nichols and told them "He is my brother" he had spent the entire defense building up to that moment where in spite of the death of 168 innocent people, he could make his client's life valuable too.

8. TELL A STORY REFLECTING YOUR THEMES AND GOALS

If there is any one characteristic that separates the most successful and persuasive lawyers from others, it is their focused ability to motivate the jury by telling a winning story. Human beings have always communicated through story telling. Be creative and use analogies when making opening and closing statements. By doing this, we will give the jury graphic poles on which they can hang their hat in understanding and remembering our themes and goals. It is not enough to list the reasons we should win. Instead, we must communicate in the way in which people naturally process, store, and learn information - through the art of storytelling.

Our brains are genetically coded to remember and store information through stories. It is the way our brains were wired for survival well before we learned to write the stories down. We had to remember exactly where the dangers lurked in hunting for food, not only for the next day or season, but to warn others as well. The Bible starts out with a story of creation. We naturally communicate by telling stories to our friends, in job interviews or simply in casual conversation. We even dream in stories. It is simply the way our brains work.

Every case contains themes and sub-themes, a beginning and an end. Stories contain questions and mysteries. It is our goal to make the jury a part of that story whenever possible so that they can write the ending consistent with the result that favors our client. Jurors are always

going to find a story that leads to, supports and explains their verdict. It is going to be the prosecutions, ours or one they find on their own. We must not ignore the power of emotion in our cases. Emotions often determine which important decisions most of us make in our lives. And memories involving emotion are the ones we remember the best. In the jury room heart believers will fight harder than head believers.

Jurors want justice and need a why and a how to get there. In the end we must empower the jurors to choose the end of the story that will make them feel that justice is done and they have rendered the best and right verdict.

9. TIE THEIR VERDICT TO THEIR OATHS

When it is time to deliver closing arguments, in most cases the jurors are divided. If they were not, verdicts would not take hours, days or sometime even weeks. It is our task in closing to try to aim our arguments, themes and story in such a powerful way that we empower those who are already in our corner. In that way we hold them. Hopefully one or two of them are leaders that can make our arguments, and sometimes ones we have not even considered, in order to convince others, especially the undecided.

The law is important to jurors and most take their oaths seriously.. Using the instructions that the judge gives can be invaluable to us in this regard. I remind jurors of the awesome power they possess - to right a wrong - and their sworn responsibility to not place any burden on me or my client. The right verdict is the one that is in accordance with the law and the evidence. Nothing they will ever do in life will have a greater impact on someone else's life than their verdict in this case. While we will go on to other cases, the effect of their verdict will forever affect the life of your client.

CONCLUSION

Many studies have shown that communication is only about 7% verbal. This is a fact and its implications are far reaching in regard to the presentation of an opening statement and a closing argument. Our story begins during jury selection. By believing in our case, focusing on our pivotal points, attacking the prosecution's weaknesses and promoting our themes through storytelling, we hold the client's last chance for us to successfully motivate the jury to bring back a favorable verdict.